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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
Zachary A. Lundin)

Examiner: Carolyn T. Blake

Serial No. 10/613,134)

Filed: July 3, 2003)

Art Unit: 3724

For: CUTTING TEMPLATE FOR CUTTING)
MEAT PIECES

Date: May 13, 2005

APPEAL BRIEF

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS
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JACK C. MUNRO

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is an appeal from the FINAL rejection of Claims 1-5 and 11 of the subject application by Examiner Carolyn T. Blake of Art Unit 3724. The second half of the appeal fee, amounting to \$250, is being submitted with this brief. If for any reason this amount is deficient, the Patent Office may charge the deficient amount to deposit account No. 13-4899. The Patent Office also has the right to credit any overpayment to deposit account No. 13-4899.

REAL PARTY IN INTEREST

The real party in interest of the subject application is the inventor, Zachary

Lundin.

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RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

Appeal Brief to CUTTING TEMPLATE FOR CUTTING MEAT PIECES
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STATUS OF CLAIMS

Claims 6-10 are withdrawn from consideration. Claims 1-5 and 11 are pending in this application and being appealed.

STATUS OF AMENDMENTS

An election letter was submitted on November 8, 2004. A first amendment was filed on February 4, 2005 which resulted in the production of the FINAL rejection March 31, 2005. An Amendment after Final has been recently submitted to correct grammatical errors in the specification and has been entered.

SUMMARY OF THE CLAIMED SUBJECT MATTER

Claim 1:

A cutting template 10 or 52 (page 7, lines 10-13; page 10, lines 11-16) to be used for cutting a plurality of meat pieces from a meat section all of which are precisely similar in size and weight. The cutting template includes a graspable handle 12 or 54 (page 7, lines 15-18; page 10, lines 15-19) composed of a planar, forefinger abutting section 16 or 58 (page 7, lines 15-19; page 10, lines 20 and 21) and a planar thumb rest section 14 or 56 (page 7, lines 14, 19 and 22; page 10, lines 18 and 19) which are separated by a crease 24 or 60 (page 7, line 25; page 10, line 21). This forefinger abutting section is deflected at the crease at an angle to the thumb rest section (page 7, lines 22-26). A guide plate 26 or 64 (page 7, line 26; page 8, lines 1 and 2; page 10, lines 22-25) is integrally attached to the thumb rest

section at an elongated lineal bend 28 or 62 (page 7, line 26; page 10, line 22). The guide plate is elongated (Figures 1 and 4) and extends transversely (page 8, lines 1 and 2) from the thumb rest section. A first guide bar 30 or 66 (page 8, lines 9-11; page 10, lines 25 and 26; page 11, line 1) is attached to the guide plate directly adjacent the lineal bend and extends outwardly from the guide plate. Whereby the guide plate is to be placed against an edge of the meat section with the first guide bar resting on the upper surface of the meat section with the operator to then move a cutting instrument around an exterior edge of the guide bar to cause severing of a meat piece with the procedure to then be repeated to obtain other meat pieces.

Claim 2:

The just previously defined cutting template can also include a means for fixing a position 38 or 72 (page 8, lines 24-26; page 9, line 1; page 11, lines 1-11) of the guide bar which is connected to the guide bar. This means causes the guide bar to be fixed in position on a meat section 40 or 74 (page 9, lines 1-7; page 11, line 12) prior to severing of the meat piece.

Claim 3:

The means for fixing comprises a structure 38 or 72 (page 8, lines 24-26) that impales the meat section.

Claim 4:

The means for fixing the position of the guide bar is defined more specifically as a row of sharply pointed sawteeth 38 or 72 (page 8, lines 24-26) mounted on the guide

bar.

Claim 5:

The guide bar of the cutting template encloses an open space 36 (page 8, lines 17-19) which is closed at one side by the guide plate and closed at the opposite side by the guide bar.

Claim 11:

The cutting template has further defined the angle between the forefinger abutting section and the thumb rest section to comprise ten to fifteen degrees (page 7, lines 22-25).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1 and 5 have been rejected under 35 U.S.C. § 102(b) as being anticipated by the reference to Kuroda. Claims 1-4 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Kuroda. Claim 11 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kuroda.

ARGUMENT

Claim 1, rejected under 35 U.S.C. § 102(b):

Independent Claim 1 has defined a first guide bar attached to the guide plate directly adjacent the lineal bend and extending outwardly from the guide plate. According to the dictionary, a bar is defined as a "relatively long, evenly shaped piece of some solid

substance used as a guard or obstruction or for some mechanical purpose". The Examiner is stating that the equivalent of the guide bar in Kuroda is the structure 2 that is defined as a basis which appears to Appellant to be a flat plate for magnetically mounting the basis 2 on a wall. The basis 2 of Kuroda is anything but a bar.

The Examiner has further stated that the guide plate of Kuroda, which is the portion of member 3 that is integrally attached to the basis 2, is to be placed against the edge of a meat section. Where did this teaching come from because it certainly is not in Kuroda. It appears to Appellant that the only way that this can be taught is by recourse to Appellant's own disclosure. In other words, Appellant's own disclosure is being used as a rejection in rejecting of Appellant's invention. In the past, this has not been permitted under the Patent Law (In re Murray et al., 122 USPQ 364; In re Warner, 154 USPQ 173; In re Kamm, 172 USPQ 298).

Although the Examiner is rejecting the present invention under 35 U.S.C. §102, it appears to Appellant that the actual rejection should be under U.S.C. §103. What the Examiner is doing is reconstructing Kuroda with the benefit of Appellant's own disclosure. Let it be assumed that the Examiner or one of ordinary skill in the art of cutting templates had before him or her the structure of Kuroda. Would that individual find that member 3 constitutes a graspable handle? Would that individual find that member 3 of Kuroda has a planar forefinger abutting section and a planar thumb rest section? Would that individual then find that the bottom section of member 3 constitutes a guide plate? Would that individual also find it obvious to utilize a bar even though there absolutely is no teaching of any bar in Kuroda

to be attached to the guide plate? It is believed that the Examiner is wanting to adhere to a 102 rejection to avoid the issue of non-analogous art. Appellant agrees that if a similar type of structure was found in the prior art in a non-analogous art, and the claims defined within the present invention read on that structure, that a 102 rejection would have merit. However, the structure that is defined within independent Claim 1 is not anticipated by Kuroda as Kuroda does not specifically teach a planar forefinger abutting section and a planar thumb rest section and a first guide bar, and the only way that one could state that such is in Kuroda is under 103.

The Examiner has further said that the alleged equivalent device of the guide plate of Kuroda that is to be placed against the edge of a meat section with the guide bar, which is the plate 4 of Kuroda, resting on the upper section of the meat section, the operator is to move a cutting instrument around the exterior edge of the plate 4 to sever a meat piece. The utilizing of the structure of Kuroda as a cutting template is not even remotely envisioned in Kuroda, and it is not believed that it would be remotely envisioned by anyone of ordinary skill in the art.

Claim 2, rejected under 35 U.S.C. §102(b):

Claim 2 defines a means for fixing the position of the guide bar which is also connected to the guide bar. Whereby this means causes the guide bar to be fixed in position on a meat section prior to the severing of a meat piece. In Kuroda, the outermost end of the insert portion 3 may include a cutter whose function is to be used to make a hole into the box into which the insert portion 3 is to be inserted. The cutter 7 is not to be used to fix in

position the member 3 relative to the box. Also, the member 7 of Kuroda is mounted on the insert portion 3 and not on the equivalent member of the guide bar, which is basis 2 of Kuroda. Appellant's means for fixing is mounted on the guide bar not on the graspable handle. Element 7 of Kuroda is not even connected to the alleged equivalent structure of Appellant's invention.

Claim 3, rejected under 35 U.S.C. §102(b):

This claim specifically defines the means for fixing as comprising a structure that impales the meat section. The alleged impaling device of Kuroda, which is the cutter 7, is located at the outer end of the guide plate and is spaced from and nowhere attached to what the Examiner deems to be the equivalent guide bar structure which comprises basis 2.

Claim 4, rejected under 35 U.S.C. §102(b):

This claim further defines that the means that impales the meat section comprises a row of sharply pointed sawteeth. It is agreed that one form of the cutter of Kuroda shows a plurality of sharply pointed sawteeth. But again, these sawteeth are mounted on a structure that is not equivalent to Appellant's structure.

Claim 5, rejected under 35 U.S.C. §102(b):

Appellant has defined that the guide bar encloses an open space which is enclosed at one side by the guide plate and enclosed on the opposite side by the guide bar. The equivalent structure of Kuroda, as alleged by the Examiner, shows a solid plate (basis) 2 which appears to be closed on all sides. It is not known how one can interpret a solid structure as enclosing an open space. The solid structure of element 2 of Kuroda could be

hollow although there is no teaching in Kuroda of it being hollow. The only reasonable interpretation for element 2 of Kuroda is that it constitutes a solid member. A solid member is required. Having it open would have no benefit to the structure of Kuroda.

Claim 11, rejected under 35 U.S.C. § 103(a):

This claim, which is dependent from Claim 1, further defines that the angle of deflection between the thumb rest section and the forefinger abutting section is within ten to fifteen degrees. Claim 11 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kuroda. It is agreed that the outer section of member 3 of Kuroda angles at some angle from the center section of member 3. However, there is no teaching of ten to fifteen degrees which has been found to be of particular advantage in conjunction with a human hand when using Appellant's invention. In any event, besides the lacking of the teaching within Kuroda of the specifically claimed angular relationship, it is believed that Kuroda constitutes a non-analogous reference. The reasons why that Kuroda is non-analogous is as follows:

The Examiner has stated that Kuroda discloses a cutting template to be used for cutting a plurality of meat pieces from a meat section, all of which are similar in size and weight. The structure of Kuroda is related to a box holder for attaching a tissue box, a clear plastic wrap box, a foil box or the like to a wall. It is Appellant's contention that the structure of Kuroda is non-analogous to the Appellant's invention.

It is to be noted that the Kuroda reference is classified in Class 248 which is generically defined as supports. The structure of the present invention is believed to be classified in Class 83 having to do with cutting. Appellant's structure does not support

anything. Appellant's structure only functions as a guide for a knife. The classification between Kuroda and the structure of the present invention are nowhere near similar.

As was stated in *In re Shapleigh*, 115 USPQ 129, "The test as to whether two references are from non-analogous arts is whether one seeking to solve a problem with respect to the embodiment of a reference in one art would be apt to seek the solution to said problem in the other art". Appellant's structure has to do with a cutting template which is to function as a guide for a knife. Appellant would not be inclined to solve a problem in conjunction with a cutting template to search the art of supports.

As was stated within *In re Oetiker*, 977 F.2d 1443, 1446, 24 USPQ 2d(BNA) 1443, 1445, "In order for a reference to be a basis for rejection of an Appellant's invention, the reference must either be in the field of Appellant's endeavor, or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." Appellant's problem has to do with a cutting template to be used with a knife for cutting meat. Kuroda relates to a device for holding a box that is in the field of supports. It is not known how one could say that a box holder could be deemed to be reasonably pertinent to a cutting template. The structures are nowhere near similar.

The test for analogous art has been said to be similarity of elements, problems and purposes. (*Universal Elec. Co. vs. A.O. Smith Corp.*, 209 U.S.P.Q. (BNA) 1077, 1081); *Skega Aktiebolag vs. B.F. Goodrich Company*, 164 U.S.P.Q. (BNA) 333, 334). The elements of Appellant's cutting template are not even similar to the elements of a box holder. The problem encountered for a box holder is certainly far afield from a problem having to do with

a cutting template. The purpose to support a box versus a cutting template are exceedingly far afield.

Also, it has even been held that bringing together knowledge held in widely diverse fields may itself be invention. It is established law that adaptation of a device to a different field may amount to invention. (King vs. Anthony Pool, Inc., 133 U.S.P.Q. (BNA) 300, 302). It would appear to Appellant that to utilize the structure of a box holder to function as a cutting template may itself be invention based on the established Patent Law. Claim 1 defines a cutting template. The reference to Kuroda does not define a cutting template but defines a box holder. Appellant's cutting template in Claim 1 defines a graspable handle which the Examiner has stated comprises member 3 of Kuroda. Member 3 is defined as an insert portion which is to be inserted within a box that is to be supported. How could one interpret an insert portion to be a graspable handle. The purpose of the insert portion is not to function as a handle but is to be inserted through the wall of a box. Appellant has further defined the graspable handle as being composed of a planar forefinger abutting section and a planar thumb rest section which are separated by a crease. It is agreed that within Kuroda that the different sections of the insert portion 3 are separated by a crease. However, from the drawing of Kuroda, it is not possible to ascertain whether these different sections are actually planar. It actually appears to Appellant that the outermost section of 3 has a slight bowed configuration and it is also believed that the middle section of member 3 of Kuroda has a slight curvature. None of the different sections of member 3 of Kuroda are intended to be contacted by a forefinger or a thumb of a human user.

The Examiner has taken the reference of Kuroda and somehow has imagined it to be utilized as a cutting template. A basic mandate inherent in 35 U.S.C. § 103 is that piece meal reconstruction of prior art patents in light of Appellant's disclosure should not be the basis of a conclusion of obviousness (In re Kamm, 172 USPQ 298). The Examiner is taking the box holder of Kuroda and is imagining reconstructing of it and to somehow use the device as a cutting template. One of the unobvious aspects of the present invention resides in the recognition of the constructing of a cutting template to produce identically sized and weighted pieces of meat. This is important so that when a restaurateur buys the meat and sells the meat in the form of a cooked item to consumers that each dish of the cooked item to each different consumer is essentially identical in weight. If the dishes are heavier than what has been programmed, then the restaurateur makes less money. This problem has not even been entertained by Kuroda. In essence, the Examiner is reconstructing the structure of Kuroda to be usable as a cutting template. This reconstruction is by using of Appellant's own disclosure. In the past, this has not been permitted under the Patent Law (In re Roberts, 176 USPQ 313).

In conclusion, it is believed that the subject matter as defined within Claims 1-5 and 11 define allowable structure and that these claims should be allowed.

CLAIMS APPENDIX

1.(previously presented) A cutting template to be used for cutting a plurality of meat pieces from a meat section all of which are precisely similar in size and weight, said cutting template comprising:

a graspable handle composed of a planar forefinger abutting section and a planar thumb rest section which are separated by a crease, said forefinger abutting section being deflected at said crease at an angle to said thumb rest section;

a guide plate integrally attached to said thumb rest section at an elongated lineal bend, said guide plate being elongated and extending transversely from said thumb rest section; and

a first guide bar attached to said guide plate directly adjacent said lineal bend and extending outwardly from said guide plate, whereby said guide plate is to be placed against an edge of the meat section with said first guide bar resting on an upper surface of the meat section with the operator to then move a cutting instrument around an exterior edge of said guide bar to cause severing of a first said meat piece with the procedure to then be repeated to obtain other said meat pieces.

2.(previously presented) The cutting template as defined in Claim 1 wherein:
means for fixing a position of said guide bar which is connected to said guide bar, whereby said means causes said guide bar to be fixed in position on the meat section prior to severing of the meat piece.

3.(original) The cutting template as defined in Claim 2 wherein:
said means comprising a structure that impales the meat section.

4.(original) The cutting template as defined in Claim 3 wherein:
said means comprising a row of sharply pointed sawteeth mounted on said guide bar.

5.(previously presented) The cutting template as defined in Claim 1 wherein:
said guide bar encloses an open space which is closed at one side by said guide plate and closed at the opposite side by said guide bar, during severing of the meat piece the meat piece is to be located directly adjacent said open space.

11.(previously presented) The cutting template as defined in Claim 1 wherein:
said angle comprising ten to fifteen degrees.

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EVIDENCE APPENDIX

Not applicable

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RELATED PROCEEDINGS APPENDIX

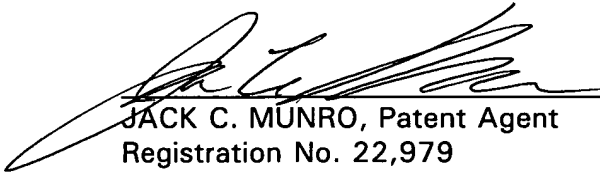
Not applicable



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Respectfully submitted,


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